SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 701

ERNEST KLEIN,

Petitioner,

vs.

WALSTON & CO., INC.,

Respondent.

PETITIONER'S REPLY BRIEF

MAXIMILIAN BADER,
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New York 7, N. Y.

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ERNEST KLEIN,

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WALSTON & CO., INC.,

Respondent.

REPLY BRIEF

I

THE FILING OF PETITION WAS TIMELY.

Evidently mistaking the date of docketing the record for the date of the filing of the petition for the writ of certiorari, respondent herein states that the petition for the writ was filed on December 28, 1962, 92 days after the entry of the order of the Court of Appeals of the State of New York. Such is not the fact.

It is respectfully submitted that the petition was transmitted to the Clerk of this Court by letter (first-class postage fully prepaid) dated and mailed on December 21, 1962, accompanied by a check in the sum of $100.00, which was as follows:

"December 21, 1962

Clerk
U. S. Supreme Court
Washington, D. C.

Re: Klein vs. Walston & Co.

Dear Sir:

I transmit herewith Petition for Writ of Certiorari in the above matter together with check in the sum of One Hundred ($100.00) Dollars as filing fee.

I will transmit under separate cover the record in this case as soon as I receive a certified copy of same from the New York Court of Appeals.

Respectfully yours,

BADER AND BADER

MB:BS"

The date of receipt of petition was December 26, 1962, evidently because the dates from December 22nd to and including the 25th, were dates when the Clerk's office was not open to receive mail.

The certified record itself was mailed to the Court as soon as it was received from the New York Court of Appeals and was received by the Clerk of this Court on December 28th, 1962, and was docketed on that date.

A copy of the telegram received from the Clerk of this Court in reply to petitioner's request, is as follows:

"WESTERN UNION
TELEGRAM

1963 JAN 25 AM 11 20

NHA012 PC112
W NFA024 COLLECT NF WASHINGTON DC 25 1054A EST
MAXIMILIAN BADER, ESQUIRE
50 CHURCH ST NYK

PETITION FOR CERTIORARI KLEIN CASE RECEIVED DECEMBER 26TH. RECORD NOT RECEIVED UNTIL DECEMBER 28TH AND CASE DOCKETED THAT DATE

JOHN F. DAVIS CLERK (OO)."

As early as in the case of *U. S.* v. *Adams* (6 Wall 101), it was held by this Court that the paper filed in the office of the Clerk of the Court was sufficient to indicate the intent to exercise the right to apply to this Court for a review of the matter.

The date of entry of the order of the Court of Appeals (September 27, 1962), must be excluded from the computation (*Smith* v. *Gale*, 137 U. S. 577).

The rule itself (Rule 23) considers the filing of a petition timely if filed with the Clerk within the time prescribed by law. The filing of the petition was in advance of the time prescribed and the record was filed promptly upon its receipt from Albany.

The order of the Court of Appeals was put on pages 11-12 as the Appendix of the Petition.

Assuming, arguendo, that the last day to file the certified record was December 27, the two holidays, December 24 and December 25, would have extended the last filing day to December 29th. Respondent's claim of late filing is therefore contrary to the facts and without merit.

II

As to the "Statement" in Respondent's Brief on page 2 that "Petitioner had victimized thirteen different brokerage houses" it is respectfully submitted that this is the malicious and wholly false statement of respondent's trial counsel in the Court below, uncorroborated and not substantiated by any shred of evidence.

It must be obvious that the employment of these untruths in the very first line of respondent's "Statement" is calculated to place petitioner in an unfavorable light in the eyes of this Court and besmirching his good character and reputation.

As to the other statements and folio references in respondent's brief we do not wish to point out their individual incorrectnesses but submit the entire record for determination of the true facts in the matter.

III

As to respondents interpretation of the decision of the Court of Appeals that its dismissal was based on the Court's discretion it is respectfully submitted that it is evident from the order of the Court of Appeals that it was based solely on the alleged limitation of its powers under the New York State Constitution which the petitioner maintains deprived him of due process.

The order of June 6th, 1961, was not referred to, in the decision or order of the Court of Appeals. Any ruling with respect to such order, had it been made, would have been expressly noted and discussed by the Court of Appeals in the same manner, as the Court of Appeals did, with regard to the orders of May 22 and June 23, 1961. The June 6th order was entirely overlooked, not passed on, by the Court

of Appeals, and yet, is clearly a final orde
make any determination thereon deprived
process.

It is respectfully submitted that the
orders of May 22, 1961, June 23, 1961, and
not final orders, is clearly erroneous.

In holding that the orders sought to
do not finally determine the actions withi
the New York Constitution, the Court of
that it has no power to entertain such
decision deprived petitioner of due process

It is respectfully submitted that the fai
of Appeals to exercise *its power to review*
resulted in depriving petitioner of his pr
of due process.

Respectfully submitted,

M

Dated: New York, N. Y.
January 31, 1963.